2005

Enrique Martinez v. Media-Paymaster Plus (self-insured The Church of Jesus Christ of Latter-day Saints), and Labor Commission : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ENRIQUE MARTINEZ, Petitioner, (Respondent on *Certiorari)* v. MEDIA-PAYMASTER PLUS (self-insured The Church of Jesus Christ of Latter-day Saints), and LABOR COMMISSION, Respondents (Petitioners on *Certiorari*).	20050745-SC Case No. ~~20050575-SC~~ (Consolidated with No. 20050750)

RESPONDENT'S BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(5).

STATEMENT OF THE ISSUES & STANDARDS OF REVIEW

Issue 1: Whether the Court of Appeals correctly held that employers have the burden to prove Utah Code Ann. § 34A-2-413(1)(c), where the current statute incorporated the employee's common law burden of proof and codified the employer's common law defenses. Standard of Review: Correction of error, *Beaver County v. Utah Tax Comm'n*, 916 P.2d 344, 357 (Utah 1996) under a sliding scale for abuse of discretion. *Drake v. Indus. Comm'n*, 939 P.2d 177, 181 (Utah 1997). Preservation of issue: Decided by the Court of Appeals, *Martinez v. Media-Paymaster Plus*, 2004 UT App 278 ¶4.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

Whether the employer or the employee has the burden to prove Utah Code Ann. § 34A-2-413(1)(c) is governed by this Court's interpretation of that statute. The statute is set forth in Appellants' addendum.

Whether the Labor Commission's denial of benefits was correctly reviewed for abuse of discretion is governed by Utah Code Ann. § 63-46b-16(4)(h), and is set forth verbatim in Appellee's addendum in Respondent's Brief.

STATEMENT OF THE CASE

Mr. Martinez briefly worked for Media-Paymasters Plus as an extra on a movie set. Mr. Martinez also held a second job at McDonald's as a fast food worker. On October 28, 1996, Mr. Martinez sustained significant permanent injuries when he fell down some stairs on the movie set. His injuries included his neck, right shoulder, and right hand. Mr. Martinez filed an application for hearing, and the Commission found that he had sustained the aforementioned injuries, resulting in permanent impairment, temporary total disability and medical treatment expenses.

Mr. Martinez tried to return to work with both Media-Paymasters Plus and McDonald's, but neither employer would accommodate his limitations. Mr. Martinez then applied for social security disability benefits and was awarded benefits as of the day of his industrial accident. He then filed an application for hearing, seeking an award of permanent total disability benefits.

At the hearing, Mr. Martinez put on evidence that he was entitled to benefits. Media-Paymasters Plus' only witness testified that there were no jobs he could do, and that he might only work if an employer created a new job, or modified an existing job tailored to his limitations. The Administrative Law Judge denied Mr. Martinez's claim. Mr. Martinez appealed to the Labor Commission, but the Commission denied his appeal. The Commission concluded that Mr. Martinez could perform the essential functions of a fast food worker, and that work was "reasonably available" to him. The Commission did

not mention the employer's admission that no jobs existed that Mr. Martinez could perform. Mr. Martinez appealed to the Court of Appeals.

The Court of Appeals reversed the Commission's denial. It concluded that employees need only prove the elements of Utah Code Ann. § 34A-2-413(1)(b), and that employers have the burden to prove the affirmative defenses set forth in Utah Code Ann. § 34A-2-413(1)(c). The court also reviewed the Commission's conclusions for abuse of discretion. It determined that the Commission abused its discretion when it ignored limitations it specifically adopted, and when it ignored Media-Paymasters Plus' admission that there were no jobs Mr. Martinez could perform. This appeal followed.

SUMMARY OF ARGUMENT

Employers have the burden to prove the elements of Utah Code Ann. § 34A-2-413(1)(c). The statute codified and modified Utah common law for permanent total disability claims. At common law, employees had the burden to prove that they were permanently totally disabled by showing that their industrial injuries prevented them from performing their jobs. The current statute codified this common law element at Utah Code Ann. § 34A-2-413(1)(b)(ii). The current statute states that employees have the burden to prove three elements – including the common law requirement – to "establish entitlement to benefits." Id. at § 34A-2-413(1)(b)(i)–(iii). Just like common law, the burden then shifts to the employer to prove its affirmative defenses.

The current statute codified employers' common law defense, namely, the existence of readily available work. It also expanded employers' defenses. Under the current statute, employers can defeat employee's claims by proving one of four listed defenses: (i) the employee is gainfully employed; (ii) them employee's impairment does not limit his ability to do basic work activities; (iii) the impairments do not prevent him from performing the essential functions of his job; and, (iv) the employee can perform other reasonably available work. Utah Code Ann. § 34A-2-413(1)(c)(i)–(iv). The Commission "shall conclude" that the employees' facts meet all four listed criteria "to find an employee permanently totally disabled." Id.

This Court should affirm the *Martinez* decision, and conclude that employers have the burden to prove the elements of Utah Code Ann. § 34A-2-413(1)(c) for several compelling reasons. First, the plain language of the statute expressly limited employees' burden of proof to Utah Code Ann. § 34A-2-413(1)(b). Second, if the Court concludes that the statute was ambiguous, there was no legislative intent on this issue when the current statute was passed. Nor was the statement of legislative intent valid under H.B. 150 because the bill violated the separation of powers, and was not expressly retroactive. Third, holding that employers have the burden to prove the elements of Utah Code Ann. § 34A-2-413(1)(c) was consistent with Utah common law, and the statute used the same essential common law terms. Finally, holding that employers have the burden to prove their affirmative defenses is consistent with public policy.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY GAVE LITTLE IF ANY DEFERENCE TO THE COMMISSION'S CONCLUSIONS AS TO BURDEN OF PROOF

The Court of Appeals correctly gave no deference to the Commission's erroneous determination that employers have the burden to prove part (c). Whether an agency properly allocated burdens of proof is a question of law is viewed for correctness. *Beaver County v. Utah Tax Comm'n*, 916 P.2d 344, 357 (Utah 1996). "Because the allocation of burdens of proof is a question of law, and [the applicable code section] does not 'explicit[ly] grant discretion,' we must 'grant the commission no deference . . ., applying a correction of error standard [of review].'" Id. at 357 (citations omitted). In that case, this Court granted no discretion to the tax commission's allocation of who had the burden of proof.

Similarly, the Court of Appeals properly reviewed for correctness when it reviewed the Commission's assignment of the burden to prove part (c) to employees. The statute gave the Labor Commission no discretion to determine who had the burden of proof, and therefore its decision was entitled to no deference. As to the issue of burden of proof, this Court should hold that the Court of Appeals correctly reviewed for legal error with no deference to the Commission's conclusions.

That said, the statute gave the Commission implied discretion to apply the law to the facts. Where statutes confer implied discretion, reviewing courts apply a sliding scale

of strictness. *Sierra Club v. Utah Solid Hazardous Waste Control Bd.*, 964 P.2d 335, 341 (Utah App 1998) (citing *Drake v. Indus. Comm'n*, 939 P.2d 177, 181 (Utah 1997) with approval). This sliding scale encompasses "varying degrees of strictness, falling anywhere between a review for correctness and a broad abuse of discretion standard." *Drake*, 939 P.2d at 181 (internal quotations and citations omitted). Accordingly, the Court of Appeals properly reviewed the Commission's application of the law to the facts – whether Martinez he could perform the "essential" functions of his job, or whether work was "reasonably available" – for abuse of discretion. *Martinez*, 2005 UT App 278 ¶10.[1]

But determining burdens of proof was strictly a matter of statutory interpretation, and should be reviewed for legal error (or something close to it) under *Drake*. The statute did not confer the Commission any discretion to engage in strict statutory intepretation; instead, it implicitly let the Commission apply the law to the facts. The Commission's erroneous interpretation of the parties burdens of proof was properly reviewed for correctness (or something close to it), and this Court should affirm the *Martinez* decision.

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[1] Abuse of discretion review encompasses review for reasonableness and rationality. *Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n*, 814 P.2d 581, 587-88 (Utah 1991).

II. EMPLOYERS HAVE THE BURDEN TO PROVE THE ELEMENTS OF UTAH CODE ANN. § 34A-2-413(1)(c) BECAUSE: (A) THE STATUTE'S PLAIN LANGUAGE SO REQUIRES; (B) THERE WAS NO CONTRARY LEGISLATIVE INTENT; (C) THE STATUTE CODIFIED AND EXPANDED UTAH COMMON LAW; AND (D) IT IS CONSISTENT WITH PUBLIC POLICY IN WORKERS COMPENSATION CASES.

This Court should affirm the *Martinez* decision because it correctly held that employers have the burden to prove Utah Code Ann. § 34A-2-413(1)(c). This Court should conclude that the statute unambiguously limited employees' burdens of proof to Utah Code Ann. §34A-2-413(1)(b) [Hereinafter: "part (b)"], and that the employer had the burden to plead and prove affirmative defenses contained in Utah Code Ann. §34A-2-413(1)(c) [Hereinafter: "part (c)"]. Alternatively, if this Court concludes that the statute was ambiguous as to whether employers must prove the elements of part (c), it should hold that the employer had the burden, and uphold the *Martinez* decision for four reasons. First, the legislature expressed no intent as to who had the burden of proof when it passed the current statute, and the recent enactment of H.B. 150 was an impermissible attempt by the legislature to determine the outcome of a pending case, and was invalid, but in any case, not retroactive. Second, the *Martinez* decision applied standard grammar and punctuation to the statute, and was consistent with established rules of statutory construction. Third, the *Martinez* decision was consistent with established precedent. Finally, the *Martinez* decision was consistent with established public policy in workers' compensation cases.

A. The Statute Unambiguously Limited Employees' Burden of Proof To 413(1)(b).

This Court should affirm the *Martinez* decision because the plain language of the statute expressly limited employees' burdens of proof to part (b). This Court need not interpret a statute unless it is truly ambiguous. "The plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language to legislative history or policy considerations." *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 13, 993 P.2d 207, 210. In this case, the plain language of the statute shows that employers have the burden to prove part (c).

At the time of Mr. Martinez' accident in 1996, the permanent total disability statute read in pertinent part:

> (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of the evidence that:
>
> (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
>
> (ii) the employee is permanently totally disabled; and
>
> (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.
>
> (c) To find an employee permanently totally disabled, the commission shall conclude that:
>
> (i) the employee is not gainfully employed;
>
> (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
>
> (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational

disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413(1)(b)–(c)(1994). The plain language of the statute showed that employers have the burden to prove part (c).

The pertinent portion of the statute consisted of two contrasting parts: part (b) and part (c). Part (b) specifically listed what employees must prove to "establish entitlement to permanent total disability benefits." Utah Code Ann. §34A-2-413(1)(b). There were no other burdens or preconditions to employees' entitlement; only part (b). The plain language of the statute unambiguously limited employees' burden of proof to part (b).

But the Commission's "conclusions" required under part (c) were qualitatively different than the facts employees had to prove under part (b). In contrast to part (b), part (c) required the commission to conclude that (i) the employee was not gainfully employed, (ii) the impairment limited the employees ability to do basic work activities, (iii) the employee could not perform the essential functions of the last job, and (iv) that the employee could not perform other "reasonably available" work. Id. at § 34A-2-413(1)(c)(i)–(iv). Only one possible conclusion can be drawn from the difference between what employees must prove for "entitlement" under part (b) and what the commission must conclude under part (c): employers have the burden to prove the facts in

part (c), or the commission "shall conclude" that employees are permanently totally disabled.

This Court should affirm the *Martinez* decision because employers have the burden to prove part (c). The plain language of the statute showed that the legislature expressly limited employees' burden of proof to part (b). When the employee proved those facts, he established "entitlement to permanent total disability benefits." Utah Code Ann. § 34A-2-413(1)(b). Employers had to prove part (c), or the commission "shall conclude" that the employee is permanently totally disabled. Id. § 34A-2-413(1)(c). This Court should hold that the statute unambiguously limited employees' burdens of proof to part (b), and that employers have the burden to prove part (c).

B. This Court Should Affirm The Court of Appeals' Decision If It Concludes That The Statute Is Ambiguous.

If this Court holds that the statute is ambiguous, it should affirm the *Martinez* decision because it was consistent with statutory construction, precedent, and public policy in interpreting workers compensation statutes. Before addressing those topics, however, this Court should conclude that the legislature never expressed its intent when it passed the current statute, and that H.B. 150 was invalid *ab initio* because it violated the separation of powers. Consequently, where there is no expressed legislative intent, this Court must rely on statutory construction, precedent, and public policy in interpreting workers compensation statutes. *State v. Barrett,* 127 P.3d 682 (Utah, 2005). Accordingly, this Court should uphold the *Martinez* decision.

1. The Legislature Never Intended to Burden Employees With Proving Part (c).

This Court should find that there was no legislative intent that employees must prove part (c) when the current statute was enacted. This Court may take judicial notice of legislative proceedings. Order at 1, Add. 37. But none of the transcripts provided by WCF show any legislative discussion on who has the burden of proof under part (c). To the contrary, the legislators only discussed the definition of permanent total disability, and not who had the burden of proof. Transcript of proceedings, S.B. 123 at 2.[2] This Court should find that there is no evidence of the legislature's intent as to who has the burden of proof under part (c). Accordingly, this Court must look to statutory construction, precedent, and public policy. This Court should affirm the *Martinez* decision because statutory construction, precedent, and public policy supported its conclusion that employers have the burden to prove part (c).

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[2] In light of this Court's ruling that WCF may not supplement the record, Appellee's brief cites to the transcripts contained in WCF's brief, which are unofficial. There are no official transcripts that are part of this record. Therefore, should this Court find that the cited transcripts are not reliable sources of legislative intent, Appellee would withdraw this citation, and simply assert that there is no evidence of any legislative intent in support of Appellants or WCF's arguments.

2. H.B. 150 Does Not Apply To This Case.

The recent passage of H.B. 150[3] has forced Mr. Martinez to address it in this brief. Appellants' Reply will predictably argue that H.B. 150 disposed of the burden of proof issue – as if this Court has no further responsibility in this case. This Court, however, must independently determine the law in this case, especially where the legislature improperly tried to dictate the result. Before voting, the legislative debate included an admission that the purpose of H.B. 150 was to correct an "error" in a "recent Court of Appeals case," Add. 10, thereby affecting the result in this case. Accordingly, this Court should find that legislative purpose was improper: This Court should hold that H.B. 150 was invalid *ab initio* because it violated the separation of powers. Alternatively, this Court should find that H.B. 150 does not retroactively apply to this case.

a. H.B. 150 Improperly Tried To Affect This Case.

This Court should find that H.B. 150 improperly tried to dictate the outcome of this case. Legislatures may not decide the rule of law in a pending case. *United States v. Klein*, 80 U.S. 128, 146-47, 20. L. Ed. 519 (1872). Where a law is passed to affect a pending case, it is invalid because it violates the separation of powers between the legislative and judicial branches. *Buckley v. Valeo*, 424 U.S. 1, 118-24, 46 L. Ed. 2d 659,

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[3] This Court granted certiorari on November 16, 2005. H.B. 150 was introduced in the House on January 24, 2006, and passed the House on February 21, 2006. In the final hours of the last day of the legislative session on March 1, 2006, it passed the Senate. Last Friday, March 17, 2006, Governor Huntsman signed H.B. 150 into legislation.

96 S. Ct. 612 (1976), (per curiam); *Chadha v. Immigration and Naturalization Service*, F.2d 408, 420 (9th Cir. 1980). The facts show that the purpose of H.B. 150 was to affect this case, and should be invalidated by this Court.

In the case of *In re Washington Public Power Supply System Securities Litigation*, 673 F. Supp 411 (W. D. Wash.), the court invalidated legislation under separation of powers principles because it was passed to affect a pending case. Between 1977 and 1981, the Washington Public Power Supply System (WPPSS) issued $2.25 billion in municipal bonds to finance two major power projects. In 1981, the projects were terminated and litigation was started under the Washington State Securities Act (WSSA) to determine the repayment duties of the issuers. The standard of fault required to find civil liability under WSSA was not explicitly stated in the original legislation, but by 1980, Washington courts had determined that negligence was the applicable standard. Id. at 414. In 1985, the Washington Legislature amended the WSSA, and raised the standard of fault to scienter. The legislation was not explicitly retroactive, and in 1986, the federal district court found that it only applied prospectively. Id. Within two weeks, the Legislature introduced new legislation (the "1986 Amendment") that was explicitly retroactive, and the court was again called on to determine the applicability of the law to the pending litigation. It concluded that the Washington Legislature violated the constitutional principle of separation of powers when it passed the new legislation. Id. at 415.

> The principle of separation of powers is fundamental to our system of government in which the legislature is to enact laws of general application, and courts are to decide particular cases arising under those laws. Legislative actions which contravene the principle of separation of powers are unconstitutional. It is not for the legislature to determine the rule of decision in a particular case, nor otherwise unduly impact judicial power to decide pending cases.

Id. (citations omitted). The court found that the Legislature was candid about the purpose of the 1986 Amendment: to protect Washington utility ratepayers by protecting local entities, who if found liable, would increase utility rates. Id. The court found that the Legislature intended the 1986 Amendment to benefit the state's ratepayers by changing the rule entitling plaintiffs to relief, not by changing the remedy. The court observed that the remedy remained the same after the 1986 Amendment, but "the quantum and nature of proof required has been changed to make it more difficult for plaintiffs to prevail against these public defendants." Id. at 416. The court concluded that the 1986 Amendment was an unconstitutional intrusion on the judicial responsibility to resolve cases and controversies. Id. at 417. Similarly, this Court should find that the legislative purpose of H.B. 150 was to affect the outcome of this case, and that it violated the separation of powers.

This Court is fully aware of the seriousness of legislative interference with the judiciary's responsibility to decide cases and controversies. "We recognize the potential mischief, indeed, the grave constitutional problems, that could arise if the Legislature were to attempt to determine the outcome of a particular case by passage of a law

intended to accomplish such a purpose." *Foil v. Ballinger,* 601 P.2d 144, 151 (Utah 1979). This Court should find that H.B. 150 was enacted to affect this case because: (1) the legislators freely admitted that H.B. 150 was to correct an "error" from this "recent Court of Appeals case"; and (2) the language of H.B. 150 precisely addressed the issue on appeal with significant input from Amicus WCF. For these reasons, this Court should find that the legislative purpose of H.B. 150 was to affect this case, and should invalidate H.B. 150 based on separation of powers principles.

(i) Legislative Admission

The legislature was told that H.B. 150 was intended to affect the outcome of this case moments before it voted to pass the bill. Senator Ed Mayne candidly explained:

> [H.B. 150] clarifies the long standing view that it is the workers' burden of proof to show an entitlement to permanent total disability benefits. A recent Court of Appeals case removes much of that employees' burden in this regard. Correcting this error will avoid an increase in claims costs associated with more permanent total disability cases generated because of relaxation of employees' burden of proof.

Add. 10. Where the legislature was specifically told that H.B. 150 would correct the "error" that was the "recent Court of Appeals case," the express purpose of H.B. 150 was to affect the outcome of this case.

(ii) Precise Legislative Language With Significant Amicus Involvment.

The language of H.B. 150 shows that it was enacted to affect the specific issues in this case. H.B. 150 contains, *inter alia*, amendments to Utah Code Ann. § 34A-2-413(1)(b) and (c), specifically making employees prove all elements listed in both (b) and (c) – the very issue in this case. See Text of H.B. 150, Add. 12-36. Like the 1986 Amendment in the *In re Washington Public Power* case, H.B. 150 sought to change the rule entitling Mr. Martinez to relief, and not his remedy. Like the 1986 Amendment, "the quantum and nature of proof required has been changed to make it more difficult for plaintiffs to prevail" under H.B. 150. The language of H.B. 150 shows that it was drafted to make it more difficult for Mr. Martinez to prevail in this case.

Amicus WCF was also significantly involved with H.B. 150's passage. When it asked to be granted Amicus status, WCF told this Court about its financial interest in the outcome of this case, as a matter of precedent. Motion For Leave To Submit Brief Of Amicus Curiae at 1. On February 6, 2006, a WCF representative testified in support of H.B. 150 at the House Business and Labor Committee Meeting. App. 5. WCF told the legislators that H.B. 150 corrected the Court of Appeals case that had misconstrued the statute. App.7.[4] WCF did not pass H.B. 150, and its participation in the legislative process was entirely lawful. But it is also evident that WCF was significantly involved in

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[4] The Appendix contains an internet link to the audio file of the February 6, 2006 meeting.

H.B. 150's passage, and told legislators that H.B. 150 would correct the *Martinez* decision, even as it participated in its appeal.

If this Court finds that the purpose of H.B. 150 was to affect this case, it must ignore its statement of legislative intent. Under the section, "legislative intent language" the bill reads:

> It is the intent of the Legislature that the amendments to Section 34A-2-413 in this bill be interpreted as merely clarifying an existing principle that the employee bears the burden of proving that the employee is permanently totally disabled based on those factors listed as matters on which the commission is to make a conclusion in Subsection 34A-2-413(1)(c), as enacted before amendment of this bill.

Add. 35-6. But this Court should not defer to the statement of legislative intent where H.B. 150 violated the separation of powers. Alternatively, if this Court concludes that H.B. 150 did not violate the separation of powers, it should, at minimum, view H.B. 150 as an inauthentic source of legislative intent, given its dubious beginnings, and its whirlwind passage during the pendency of this appeal.[5]

b. H.B. 150 Did Not Retroactively Apply To This Case.

Even if HB 150 did not violate the separation of powers, this Court should find that H.B. 150 did not retroactively apply to this case because it contained no clear statement of retroactive application. Under Utah law, "[n]o part of these revised statutes is retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3 (2000).

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[5] See n.3 and accompanying text.

Accordingly, in Utah, a statute "generally cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute." *Washington Nat. Ins. v. Sherwood Assoc.* 795 P.2d 665 (Utah App. 1990) (cited with approval in *Thomas v. Color Country Mgmt.*, 2004 Utah 12 ¶ 31, 84 P.3d 1201, 1210). H.B. 150 did not expressly state that it retroactively applied to pending cases, consequently, this Court should hold that it did not apply to this case.

Nor was H.B. 150 retroactive because it substantively changed the parties burdens' of proof. H.B. 150 was not "merely procedural": "According to this exception, amendments that merely alter the procedure by which the substantive rights are adjudicated are retroactively applicable." *Thomas*, 2004 Utah 12 ¶ 33, 84 P.3d at 1210. Allocating the parties' burdens of proof was not merely procedural because it changed the substantive legal requirements for entitlement to permanent total disability benefits. Accord, *Thomas*, 2004 Utah 12 ¶ 43, 84 P.3d at 1213. This Court should hold that H.B. 150 has no retroactive application because it is substantively changed the requirements for permanent total disability benefits.

3. *The Statute's Punctuation and Rules of Statutory Construction Show That Employers Have The Burden Of Proof Under Part (c).*

This Court should affirm the *Martinez* case because the statute's punctuation and rules of statutory construction show that employers have the burden to prove part (c). Applying the "elementary rules of punctuation and grammar" supports the Court of Appeals' conclusion. *Newspaper Agency v. Auditing Div.*, 938 P2.d 266, 271 (Utah

1997). The Court of Appeals rightly considered the statute's punctuation:

> [W]e note that courts should not arbitrarily ignore punctuation, but [should] give it due consideration and effect where it may be used as an aid to ascertain the legislature's purpose. Subsection (1)(b) is a complete sentence ending with a period. *See* Utah Code Ann. § 34A-2-413(1)(b) (2001). Thus, subsection (1)(b)'s assignment of the burden of proof does not apply to subsection (1)(c).

Martinez, 2005 UT App 278 ¶ 7 (citations and internal quotations omitted). Part (b) is a single and complete statement of the employee's burden of proof: When proven, the employee has "established entitlement" to permanent total disability benefits. This Court should find that the statute's punctuation shows that employers have the burden of proof under part (c).

The statute's construction also shows that employers have the burden to prove part (c). Part (b) precisely and clearly assigned employees the burden of proof on three issues, but part (c) did not. This Court has repeatedly stated that the specific inclusion or exclusion of statutory terms must be considered to understand the meaning of a statute: "[S]tatutory construction presumes that the expression of one should be interpreted as the exclusion of another. Thus, we should give effect to any omission in the ordinance language by presuming that the omission is purposeful." *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 30 (citing *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 1216, with approval) (internal quotations and citations omitted). The Court of Appeals correctly considered the statute's specific inclusion of the employee's burden of proof

under part (b) and its specific exclusion of the employee's burden of proof under part (c):

> Because subsection (1)(b) is so clear and explicit on what the employee has the burden of proving, subsection (1)(c) should be construed as listing the factors on which the employee does not have the burden of proof.

Martinez, 2005 UT App 278 ¶ 8. This Court should find that the statute specifically included employees in part (b) and purposefully omitted employees from part (c). If so, the statute's construction leaves only one possible interpretation: employers have the burden to prove part (c). This Court should affirm the *Martinez* decision and hold that employers have the burden to prove part (c).

4. Requiring Employers to Prove Part (c) Was Consistent With Established Precedent.

This Court should uphold the *Martinez* decision because it is consistent with precedent, both in cases that applied the current statute, and common law cases that defined "permanent total disability." The current statute incorporated Utah common law when it required employees to prove part (b) and left employers to prove part (c).

a. The *Martinez* Decision Was Consistent With Cases That Applied the Current Statute.

This Court should uphold *Martinez* because it is consistent with permanent total disability cases that have applied Utah Code Ann. § 34A-2-413. No case has ever collapsed the distinction between the employees' burden of proof under part (b) and the employer's burden of proof under part (c), as Appellants have urged this Court to do. To the contrary, this Court has already outlined employees' burdens under part (b).

In the case of *Thomas v. Color Country Mgmt.*, 2004 UT 12, 84 P.3d 120, the employee had been found tentatively permanently totally disabled, and the ALJ ordered the employer to pay subsistence benefits pursuant to Utah Code Ann. § 34A-2-413(6). The employer's insurer refused because there was no final enforceable order under Utah Code Ann. § 34A-2-212. This Court found that there was a conflict, and reasoned that a tentative finding of permanent total disability benefits was not an enforceable order. *Id.* at ¶ 24, 1208. In reaching its conclusion, this Court outlined the process for permanent total disability claims:

> Injured employees seeking permanent total disability compensation for work-related injuries must show by a preponderance of the evidence that they have become permanently totally disabled as a result of an industrial accident or occupational disease. Utah Code Ann. § 34A-2-413(1)(b) (2001).

Thomas, 2004 UT 12 at ¶ 2, 84 P.3d at 1207 (citation to part (b) in original). This Court specifically cited to part (b) for the employees burden of proof in permanent total disability cases. This Court also maintained the distinction between employees' burden of proof under part (b), and the commission's standards under part (c): "An administrative law judge must review the evidence to determine, essentially, whether the employee is permanently disabled and unable to perform reasonably available work. Id. § 34A-2-413(1)(c)." Id. (citation in original). The Court of Appeals' decision in *Martinez* is

consistent with this Court's decision in *Thomas*.[6]

b. The *Martinez* Decision Is Consistent With Utah Common Law Of Permanent Total Disability.

This Court should affirm *Martinez* because it is consistent with common law that defined "permanent total disability." Among other factors in part (b), employees must also prove that they are "permanently totally disabled." Utah Code Ann. § 34A-2-413(1)(b)(ii). "Permanent total disability" is a term of art under Utah law, and the current statute did not re-define the term. Consequently, Part (b) of the current statute required employees to prove that they are "permanently totally disabled" as that term was defined at common law.

At common law, employees had to prove their permanent total disability under the odd lot doctrine.[7] To prove permanent total disability, employees had to present evidence that they could no longer perform their old job duties, then the burden shifted to the employer:

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[6] Accord, *Intermountain Slurry Seal v. Labor Comm'n*, 2002 UT App 164, 48 P.3d 252 (distinguishing between facts employees must prove under part (b) from Commission's conclusions under part (c)).

[7] "Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." *Marshall v. Indus. Comm'n*, 681 P.2d 208, 212 (Utah 1984) (quoting 2 Larson, THE LAW OF WORKMEN'S COMPENSATION § 57.51 at 10-164.24 (1983) (footnote omitted)).

> The employee must first present a prima facie case that no regular, dependable work is available to him. To do this, the employee must present "evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated"[8] to perform some other type of employment. Once the employee has presented a prima facie case, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education [work experience], mental capacity and age.

Peck v. Eimco Processing Co., 748 P.2d 572, 575 (Utah 1987) (internal quotations and citations omitted). The odd lot cases cited by Appellants[9] support Petitioner's position. In each cited case, this Court held that the employee had met his burden of proof by showing that he could no longer perform the duties of his occupation. See *Hardman*, 725

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[8] Under the prior statute, employees did not have to prove they could not be rehabilitated. Instead, they were referred to the Division of Rehabilitation to assess their re-employment. See *Hardman v. Salt Lake Fleet Mgt.*, 725 P.2d 1323 (Utah 1986) ("[W]e did not mean that the employee must prove on his own that he is unable to be rehabilitated. Such a requirement would place the employee in the untenable position of assessing his own potential for rehabilitation."). Unlike the prior statute, the current statute makes employers responsible for rehabilitation. Employers can prepare re-employment plans for permanently totally disabled employees. Utah Code Ann. § 34A-2-413(6)(ii).

[9] This Court stated, "The Act does not set forth, however, those often unquantifiable factors that establish permanent total disability . . [W]ith regard to permanent total disability claims, that a worker may be found totally disabled if he can no longer perform work of the general nature he was performing when injured, or any other work which a man of his capabilities may be able to do, or to learn to do or for which he might be trained." *Hardman*, 725 P.2d 1323, 1325 (internal citations and quotations omitted). In other words, the Commission must take into account all relevant facts submitted into evidence, including those not quantified in the Act. Appellants move the less argued that employees had to prove "unquantifiable factors," under the common law. Brief at 15.

P.2d at 1327-28, and *Marshall*, 681 P.2d at 213. Similarly, in the *Mity-Lite* case, the Court of Appeals held that the employee had made a prima facie showing that he was permanently totally disabled, noting that "The record contains uncontroverted evidence of his physical impairment and his inability to perform the work required by his former job or any similar work." *Smith v. Mity-Lite*, 939 P.2d 684, 689 (Utah App. 1997). See also, *Hoskings v. Indus. Comm'n*, 918 P.2d 150, 153 (Utah 1996)[10], and *Spencer v. Indus. Comm'n*, 733 P.2d 158, 162 (Utah 1987).[11] Under Utah common law, employees proved they were "permanently totally disabled" if they proved they could no longer perform their job duties.

Under part (b) of the current statute, employees must still prove they are "permanently totally disabled" under the common law. The current statute incorporated that term from the common law, without redefining it. See generally, Utah Code Ann. § 34A-2-413. Taken together with the rest of part (b), employees must prove: (i) significant impairment from the accident or illness, (ii) that they can no longer perform the duties of their occupations, and (iii) that the accident or illness directly caused the permanent total

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[10] "Applying the 'odd lot' doctrine, the ALJ first found that Hoskings had met his burden of proving that the 1986 industrial accident caused his ankle injury and that he could not return to work as a fire fighter." *Hoskings*, 918 P.2d at 153.

[11] "That information also constitutes prima facie evidence that Spencer can no longer perform the duties required in his occupation and thus he cannot be rehabilitated, so that the burden shifts to the employer to prove the existence of regular steady work that the employee can perform, taking into consideration the employee's education, mental capacity, and age." *Spencer*, 733 P.2d at 162.

disability. Id. Once proven, the employee has "established entitlement" to permanent total disability benefits, Id. The burden then shifts to the employer. Id. at § 34A-2-413(1)(c); *Martinez*, 2005 UT App 278 ¶ 7; accord, *Marshall*, 681 P.2d at 212.

Just like the common law, the current statute allows employers plead and prove affirmative defenses, including the existence of readily available work. This Court (and numerous others) have long recognized that it is most appropriate to have employers prove there are jobs the employee can do, instead of employees trying prove they can not work.[12] The *Martinez* decision embodied these established common law principles when it held that part (c) functioned as employers' affirmative defenses.[13] Conversely, Appellants have cited to no case (Utah or otherwise) where an employee had to prove that he was universally unemployable to be considered permanent totally disabled. Nor does the current statute so require, yet this is the crux of Appellant's argument. This Court should affirm the Court of Appeals' decision in *Martinez,* because its statutory interpretation that employers have the burden to prove part (c) is consistent with the

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[12] "It is much easier for the [employer] to prove the employability of the [employee] for a particular job than for the [employee] to try to prove the universal negative of not being employable at any work." *Marshall*, 681 P.2d at 213 (quotations and citations omitted).

[13] "Thus, if the employee has made her prima facie case, the employer can rebut the presumption of a permanent total disability award by showing (i) that the employee is gainfully employed, (ii) that the impairment does not limit the employee's ability to do basic work activities, (iii) that the industrial-accident-caused impairments do not 'prevent the employee from performing the essential functions' of the employee's previous work or (iv) that the employee can "perform other work reasonably available." *Martinez*, 2005 UT App 278 ¶ 7 (footnote omitted).

current statute's incorporation of Utah common law.

5. *The Martinez Decision Was Consistent With Public Policy in Workers' Compensation Cases.*

This Court should affirm Martinez because it was consistent with this Court's policy of liberally construing statutory ambiguity in favor of injured employees. Where the statute is ambiguous, this Court looks to policy considerations. *Vigos v. Mountainland Builders*, 2000 UT 2 at ¶13, 993 P.2d 207, 210. This Court construes workers compensation statutes liberally in favor of finding coverage. Id. "The Work[ers'] Compensation Act is to be construed liberally to further the statutory purposes of providing relief from injuries caused by industrial accidents." *Pinter Constr. v. Frisby*, 678 P.2d 305, 306-07 (Utah 1984). "It is the duty of the courts and the commission to construe the Workers' Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction." *Heaton v. Second Injury Fund*, 796 P.2d 676, 679 (Utah 1990).

This Court should affirm the *Martinez* decision and construe part (c) as the employer's responsibility, because it is consistent with public policy. Construing part (c) as the employee's responsibility would be construing the Act against coverage because it increases the substantive requirements for permanent total disability claims, making it harder for injured workers to prove entitlement to benefits. This Court should affirm the *Martinez* decision because it was consistent with construing the Act liberally in favor of coverage.

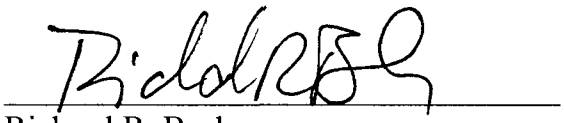
CONCLUSION

For the reasons set forth above, this Court should deny Appellant's appeal, and affirm the Court of Appeals decision in the *Martinez* case, awarding Mr. Martinez's permanent total disability benefits.

DATED this 23rd day of March, 2006.

Respectfully submitted,

KING, BURKE & SCHAAP, P.C.



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CERTIFICATE OF MAILING

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